

**A Royden (M) Sdn Bhd v Syarikat Pembinaan Yeoh
Tiong Lay Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — SUIT NO S7-23-193-87

B LIM BENG CHOON J
3 OCTOBER 1991

Contract — Building sub-contract — Failure of main contractor to make payments duly certified by architect — Whether liability contingent upon receipt from employer of the sums certified by payment certificates pursuant to main contract clause — Whether incorporated in sub-contract — Whether main contractor entitled to be indemnified by sub-contractor for loss suffered from late completion by sub-contractor

D The defendant was employed by Cosmopleks Sdn Bhd ('the employer') as the main contractor for the construction of a project, Raintree Terrace, comprising 12 units of luxury condominium apartments at Jalan Wickham, Kuala Lumpur ('the project'). By two sub-contract agreements entered between the plaintiff and the defendant, the latter appointed the former as a sub-contractor to supply and install air-conditioning and ventilation systems for the project and to supply and install lift services for the project. The plaintiff alleged that the defendant had failed or refused to pay the plaintiff certain progress payments notwithstanding that such payments were duly certified by the authorized architect of the project. Hence the plaintiff instituted this civil suit on 11 February 1987 against the plaintiff. The plaintiff made an application for summary judgment which was heard by the senior assistant registrar on 7 November 1988 and final judgment was directed to be entered against the defendant. On appeal, the defendant raised two main issues, viz (1) the defendant is not liable under cl 27(a)(vii) of the main contract entered between the defendant and the employer read with the letter of the defendant confirming the appointment of the plaintiff as sub-contractor and certain clauses in the sub-contract to pay the amounts certified by the payment certificates 14, 18 and 20 as the defendant has not received from the employer the sums included in the said payment certificates; (2) the defendant is entitled to be indemnified by the plaintiff in respect of loss or damage suffered by the defendant arising from the late completion by the plaintiff of the sub-contract works as well as from defective works carried out by the plaintiff and hence the defendant is entitled to set off against the plaintiff's claim and the defendant is entitled to cross-claim damages.

Clause 27(a)(vii) reads:

I 'That payment in respect of any work, materials, or goods comprised in the sub-contract shall be made within 14 days after the receipt by the contractor from the employer of the amounts stated in any architect's certificate under cl 30 of these conditions which includes an amount due to the nominated sub-contractor under the sub-contract.'

Held, dismissing the defendant's appeal:

- (1) The provisions of cl 27(a)(vii) were not expressly stated in the two sub-contracts. No privity of contract exists between the employer and the defendant and reading the sub-contract as a whole, it cannot be said that cl 27(a)(vii) of the main contract had been incorporated into and formed part of the sub-contract. On the contrary cl 2 of the sub-contract only required the plaintiff to observe and conform with all the provisions of the main contract so far as they were related and applicable to the sub-contract works and were not repugnant to or inconsistent with the express provisions of the sub-contract. To incorporate cl 27(a)(vii) of the main contract into the sub-contract would be repugnant to or inconsistent with the express provisions of cl 11(b) of the sub-contract which clearly required the main contractor to inform and pay the sub-contractor within 14 days upon receipt of the payment certificate issued by the architect.
- (2) Under the sub-contract the defendant would be entitled to claim any loss or damage caused by the delay on the part of the plaintiff if and only if the defendant's cross-claim for loss and damage comes within the provisions of the proviso to cl 8(a). Here there is no evidence that the architect had issued any certificate under the said proviso. It is therefore futile for the defendant to assert that it is entitled to a cross-claim for delay on the part of the plaintiff in completing the sub-contract works.

[Bahasa Malaysia summary]

Defendan telah digaji oleh Cosmopleks Sdn Bhd ('majikan') sebagai kontraktor utama untuk pembinaan satu projek, Raintree Terrace, yang mengandungi 12 unit pangsapuri kondominium mewah di Jalan Wickham, Kuala Lumpur ('projek itu'). Melalui dua persetujuan kontrak kecil di antara plaintif dan defendan, defendan melantik plaintif sebagai kontraktor kecil untuk pembekalan dan pemasangan sistem penyaman udara dan peredaran udara untuk projek itu dan untuk membekal dan memasang kemudahan lif untuk projek itu. Plaintif mendakwa bahawa defendan telah gagal atau enggan membayar plaintif bayaran berperingkat yang tertentu walaupun bayaran tersebut telah disahkan oleh arkitek projek itu. Oleh itu, plaintif memulakan guaman sivil ini pada 11 Februari 1987 terhadap defendan. Plaintif telah memohon untuk penghakiman terus yang telah didengar oleh penolong kanan pendaftar pad 7 November 1988 dan penghakiman muktamad telah diarahkan terhadap defendan. Defendan merayu dan membangkitkan dua isu utama, iaitu (1) defendan tidak bertanggung di bawah fasal 27(1)(vii) kontrak utama di antara defendan dan majikan itu, dibaca bersama dengan surat defendan yang memastikan perlantikan plaintif sebagai kontraktor kecil dan beberapa fasal tertentu di dalam kontrak kecil, untuk membayar jumlah yang disahkan oleh sijil bayaran No 14, 18 dan 20 kerana defendan belum menerima jumlah yang dinyatakan di dalam sijil bayaran itu daripada majikan; (2) defendan berhak kepada tanggung rugi oleh plaintif tentang

A kerugian atau kerosakan yang dialami oleh defendan berpunca daripada penyempurnaan lewat oleh plaintif kerja-kerja kontrak kecil itu dan juga daripada kerja tidak sempurna yang dilakukan oleh plaintif dan lantaran itu defendan berhak membuat imbalan terhadap tuntutan plaintif dan defendan berhak mendapat ganti rugi tuntutan balas.

B Fasal 27(a)(vii) berbunyi:

‘That payment in respect of any work, materials, or goods comprised in the sub-contract shall be made within 14 days after the receipt by the contractor from the employer of the amounts stated in any architect’s certificate under cl 30 of these conditions which includes an amount due to the nominated sub-contractor under the sub-contract.’

C **Diputuskan**, menolak rayuan plaintif itu:

- D (1) Peruntukan fasal 27(a)(vii) tidak ditulis dengan nyata di dalam kedua-dua kontrak kecil itu. Tiada priviti kontrak yang wujud di antara majikan dan defendan dan membaca kontrak kecil itu secara menyeluruh, tidaklah boleh dikatakan bahawa fasal 27(a)(vii) kontrak utama telah diperbadankan ke dalam dan membentuk sebahagian daripada kontrak kecil itu. Sabaliknya fasal 2 kontrak kecil cuma menghendaki plaintif mengikut dan menurut semua peruntukan kontrak utama sejauh mana mereka berhubung dan berkenaan dengan kerja-kerja kontrak kecil dan tidak janggal atau bercanggahan dengan peruntukan nyata kontrak kecil itu. Untuk memperbadankan fasal 27(a)(vii) kontrak utama itu ke dalam kontrak kecil adalah janggal atau bercanggahan dengan peruntukan nyata fasal 11(b) kontrak kecil itu yang jelasnya memerlukan kontraktor memberitahu dan membayar kontraktor kecil dalam 14 hari selepas menerima sijil bayaran yang dikeluarkan oleh arkitek.
- E (2) Di bawah kontrak kecil, defendan berhak menuntut sebarang kerugian atau kerosakan yang diakibatkan oleh kelewatan plaintif jika dan cuma jika tuntutan balas defendan untuk kerugian dan kerosakan termasuk di dalam peruntukan proviso kepada fasal 8(a). Di sini tidak adak keterangan bahawa arkitek telah mengeluarkan sebarang sijil di bawah proviso itu. Jadi tidak berguna untuk defendan mendakwa bahawa ia berhak kepada satu tuntutan balas untuk kelewatan plaintif dalam menyempurnakan kerja-kerja kontrak kecil itu.]

H **Notes**

For cases on building contract, see 3 *Mallal’s Digest* (4th Ed) paras 873-941.

I **Cases referred to**

- 1 *Hampton v Glamorgan CC* [1917] AC 13 (refd)
- 2 *Dunlop & Ranken v Hendall Steel Structures* [1957] 1 WLR 1102; [1957] 3 All ER 344 (refd)
- 3 *Chandler Bros Ltd v Boswell* [1936] 3 All ER 179 (refd)

4 *Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd* [1988] 1 MLJ 500 (distsd)

Azhar Azizan (Allen & Gledhill) for the plaintiff.

F Dorairaj (Nahappan & Peri) for the defendant.

Cur Adv Vult

Lim Beng Choon J: The defendant was employed by Cosmopleks Sdn Bhd ('the employer') as the main contractor for the construction of a project known as Raintree Terrace comprising 12 units of luxury condominium apartments at Jalan Wickham, Kuala Lumpur ('the project'). By a sub-contract agreement dated 6 August 1984 ('the first sub-contract') entered into between the plaintiff and the defendant, the latter appointed the former as a sub-contractor to supply and install air-conditioning and ventilation systems for the project. By another sub-contract agreement dated the same date ('the second sub-contract') entered into by the same parties, the plaintiff was again appointed as a sub-contractor to supply and install lift services for the project. The plaintiff alleged that the defendant had failed or refused to pay the plaintiff certain progress payments notwithstanding that such payments were duly certified by the authorized architect of the project. Hence the plaintiff instituted this civil suit on 11 February 1987 against the plaintiff.

In its writ endorsed with a statement of claim the plaintiff gave particulars of the progress payments which had been duly certified by the architect which can be summarized as follows:

- (a) First sub-contract — architect's certificate of payment Nos 14, 18 and 20 totalling \$332,013.60.
- (b) Second sub-contract — architect's certificates of payment Nos 9, 10, 11, 13 and 20 totalling \$56,250.

The plaintiff therefore claimed for an amount of \$388,263.60 with interest at the rate of 8% pa from the date of judgment until the date of full settlement thereof and costs.

After the defendant had entered appearance on 3 March 1987, the plaintiff made an application by way of summons-in-chambers dated 18 March 1987 for leave to enter final judgment for the aforesaid amount pursuant to O 14 of the Rules of the High Court 1980 ('RHC'). In the supporting affidavit affirmed by Kan Tong Seng ('Kan'), the accountant of the plaintiff, it was asserted that the defendant was at the commencement of this action and still is justly and truly indebted to the plaintiff in the sum of \$388,263.60 in respect of work done and services rendered and performed by the plaintiff pursuant to the two sub-contract agreements dated 6 August 1984. The defendant then went on to state the manner in which the plaintiff was appointed as sub-contractor and gave the particulars of the outstanding certified amount of \$388,263.60 due and payable to the plaintiff by the defendant. The particulars given were the same as that averred in the plaintiff's statement of claim.

A In response to the plaintiff's application for an O 14 judgment, the defendant applied by way of summons-in-chambers on 10 July 1987 for an order that all further proceedings in the civil suit be stayed pursuant to s 6 of the Arbitration Act 1952 as the plaintiff and the defendant by the sub-contracts had agreed that matters in respect of which this action was brought be referred to arbitration. In the supporting affidavit affirmed by **B** Gan Ching Lim ('Gan') affirmed on 20 May 1987 (which must be read with the corrective and further affidavit of Gan affirmed on 6 August 1987 as in this affidavit Gan made some corrections to his earlier affidavit), it was asserted that cl 22 of the two sub-contracts provided:

C that in the event of any dispute or difference between the contractor and sub-contractor whether arising during the execution or after the completion or abandonment of the sub-contract works or after the determination of the employment of the sub-contractor under this sub-contract (whether by breach or in any other manner) in regard to any manner or thing of whatsoever nature arising out of this sub-contract or in connection therewith then either party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to arbitration ... **D**

The defendant then went on to say that the manner in dispute was the precise amount of damages outstanding or to be set off by the defendant for substantial delay and defective works carried out by the plaintiff and other damages following therefrom. In proof of the delay caused by the plaintiff **E** it was asserted that pursuant to the sub-contract the completion date was 20 October 1984 and that of the second sub-contract was 8 December 1984. Due to the plaintiff's delay the certificate of practical completion was only granted to the plaintiff on 15 August 1985 and the employer also imposed liquidated and ascertained damages amounting to a sum of \$377,500. **F**

To counter the allegations as stated in Gan's above-mentioned affidavit, the plaintiff submitted an affidavit-in-reply affirmed by Kan on 7 August 1987. It was asserted, inter alia, in Kan's affidavit-in-reply that although the sub-contract works were originally supposed to be completed within the period as mentioned in Gan's affidavit, the defendant, however, had at a meeting held on 8 July 1985 granted an extension of time in respect of the handing over of the works to 15 July 1985. The plaintiff had accordingly completed the sub-contract works well within the extended time. As regards the defective works, the plaintiff did rectify all defects well within the defects liability period which only expired on 14 August 1986. Apart from the fact that the defendant had not made any counterclaim against the plaintiff for any alleged delay or defective work, the plaintiff had also not received any notification from the architect regarding any complaint of whatsoever nature. The defendant was accused of making up a sham counterclaim or claim for set-off which had no basis at all. **G** **H**

Finally the defendant filed in another affidavit affirmed on 4 November **I** 1988 by Yeoh Seok Hong ('Yeoh'), the executive director of the plaintiff. It was asserted, inter alia, that as far as the second sub-contract was concerned the defendant had fully made payment to the plaintiff in respect of payment certificate Nos 9, 10, 11 and 13. As regards payment certificate Nos 14 and 18 the employer only made part payment of the amount

claimed under the said payment certificates. The employer disputed the sum claimed under payment certificate No 14 and in respect of payment certificate No 18 the employer deducted a sum of \$292,500 as liquidated and ascertained damages for the delay in completing the works from the amount which was to be paid under the said payment certificate No 18. As to payment certificate No 20 the employer had failed or refused to make the payment. As a result the defendant had terminated the main contract with the employer and the disputes relating to payment in respect of payment certificate Nos 14, 18 and 20 had been referred to arbitration pursuant to cl 34 of the main contract on the grounds that:

- (i) there had been wrongful deduction by the employer of payment certificate Nos 14 and 18;
- (ii) there had been wrongful withholding of payment under payment certificate No 20.

The defendant therefore denied that the defendant was indebted to the plaintiff for the sum of \$388,263.60 for the following reasons:

- (a) clause 27(a)(vii) of the main contract specially provided that payment would be made only within 14 days after the receipt by the defendant from the employer of the amounts stated in the architect's certificate. It was clear that payments were not made by the employer in respect of the amount certified in payment certificate Nos 14 and 18;
- (b) the very fact that payment certificate Nos 14 and 18 were being reopened in arbitration certainly meant that the amounts claimed thereunder were uncertain at the material time;
- (b) as regards payment certificate No 20, this was again under arbitration because the employer had failed to make payment due thereunder.

The defendant again reiterated that payments in respect of payment certificate Nos 9, 10, 11 and 13 had been fully paid to the plaintiff by the defendant and the relevant payment voucher was produced and annexed in exh 'YSH3' to Yeoh's affidavit.

The application of the plaintiff for an O 14 judgment was heard by the senior assistant registrar ('the SAR') who on 7 November 1988 found for the plaintiff and directed that final judgment be entered against the defendant for the sum of \$388,263.60 together with interest and costs appearing in the statement of claim. Being dissatisfied with the decision of the SAR the defendant gave notice of appeal against the decision of the SAR.

From my summary of the several allegations and counter allegations contained in the affidavits filed on behalf of the plaintiff and the defendant respectively, it is clear that there are two main issues raised by the defendant:

- (1) the defendant is not liable under cl 27(a)(vii) of the main contract entered between the defendant and the employer read with the letter of the defendant confirming the appointment of the plaintiff as sub-contractor and certain clauses in the sub-contract to pay the amounts certified by the payment certificates 14, 18 and 20 as the defendant has

- A** not received from the employer the sums included in the said payment certificates;
- (2) the defendant is entitled to be indemnified by the plaintiff in respect of loss or damage suffered by the defendant arising from the late completion by the plaintiff of the sub-contract works as well as from defective works carried out by the plaintiff and hence the defendant is entitled to set off against the plaintiff's claim and the defendant is entitled to cross-claim damages.
- B**

In considering the first issue it is appropriate to set out the provisions of cl 27(a)(vii) of the main contract which are as follows:

- C** That payment in respect of any work, materials or goods comprised in the sub-contract shall be made within 14 days *after receipt by the contractor from the employer of the amounts stated in any architect's certificate* under cl 30 of these conditions which includes an amount due to the nominated sub-contractor under the sub-contract. (Emphasis supplied.)
- D** In addition, the defendant in its letter dated 21 April 1984 (see exh 'GCL4' annexed to Gan's affidavit affirmed on 20 May 1987) affirming the appointment of the plaintiff as nominated sub-contractor, stated, inter alia, that the sub-contract of the plaintiff was 'subject to the main and sub-contract conditions'. However that may be, in the two sub-contracts (the wordings of which are identical) subsequently drawn up and executed by the defendant and the plaintiff, the provisions of cl 27(a)(vii) of the main contract were not expressly stated therein. It must therefore be borne in mind that the general rule under the common law is that there is no privity of contract between the employer and the sub-contractor (see for instance *Hampton v Glamorgan CC*¹). This proposition is of course subject to the terms and conditions stipulated in the sub-contract which may expressly or implicitly make it subject to the conditions of the main contract. In the present case it is therefore necessary to scrutinize the two sub-contracts executed by the plaintiff and the defendant to find out whether the intention of the plaintiff and the defendant was to import the said cl 27(a)(vii) into the said sub-contracts. (See *Dunlop & Ranken v Hendall Steel Structures*.²)
- E** That being the case an in-depth scrutiny of the relevant clauses of the two sub-contracts is essential. The second recital speaks of the sub-contractor having had opportunity of inspecting the main contract. The operating provisions of the sub-contract relevant to this issue are cl 1 which provides that the sub-contractor would be deemed to have notice of all the provisions of the main contract with certain exceptions which are not relevant to this issue. Clause 2 requires the sub-contractor to observe and conform with all the provisions of the main contract so far as they are related and applicable to the sub-contract works and were not repugnant to or inconsistent with the express provisions of the sub-contract. The provisions of cl 3 emphasize that nothing in the sub-contract would create any privity of contract between the sub-contractor and employer or any other sub-contractor. Clause 3(a) required the contractor, subject to the main contract, from time to time to apply to the architect for certificates of payment and for the inclusion therein of the amount which at the date fairly
- F**
- G**
- H**
- I**

represented the total value of the sub-contract works and of any variation. Then we have the important provisions in sub-cl (b) of cl 11 which reads:

Within 14 days of the receipt by the contractor of any certificate or duplicate copy thereof from the architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of contracts ascertained under cl 8(c) hereof less:

- (i) retention money that is to say the proportion attributable to the sub-contract works of the amount retained by the employer in accordance with the main contract; and
- (ii) the amounts previously paid.

Bearing in mind the no privity of contract principle and reading the sub-contract as a whole I cannot see how one could say that cl 27(a)(vii) of the main contract had been incorporated into and formed part of the sub-contract. On the contrary cl 2 of the sub-contract only required the plaintiff to observe and conform with all the provisions of the main contract so far as they were related and applicable to the sub-contract works and *were not repugnant to or inconsistent with the express provisions of the sub-contract*. Thus in *Chandler Bros Ltd v Boswell*³ the sub-contract there contained many provisions in similar terms to those in the main contract but none referred to or incorporated a power in the main contract of the engineers to require the removal of a sub-contractor with whom they were dissatisfied. The sub-contractor was delayed by lack of funds and the engineers served a notice under the main contract. It was held, inter alia, that a recital that the sub-contractor had agreed to carry out the work in accordance with terms of the main contract did not, where other clauses were expressly included, incorporate the clause in question. In the present case the plaintiff's contention that cl 27(a)(vii) of the main clause had not been imported into the sub-contract stands on firmer ground because to do so would be repugnant to or inconsistent with the express provisions of cl 11(b) of the sub-contract which clearly required the main contractor to inform and pay the sub-contractor within 14 days upon receipt of the payment certificate issued by the architect. Counsel for the defendant drew my attention to the case of *Brightside Mechanical & Electrical Services Group Ltd & Anor v Hyundai Engineering & Construction Co Ltd*,⁴ a Singapore case, where Thean J held that the plaintiffs, sub-contractors, were not entitled to be paid until the owner had paid the defendants the sum claimed by the plaintiffs. It must be noted that the wordings used in cl 11 in the sub-contract in that case were different from cl 11 in the sub-contract in the present case. First, cl 11(a) of the sub-contract in the Singapore case provided that on an application made by the main contractor to the architect for a payment certificate the architect would and *subject to the terms of the main contract* issue a certificate of payment. The use of the words emphasized by me, to my mind, suggested that the obligation of the defendant to pay the plaintiff was not absolute but only in accordance with the terms of the main contract. Furthermore cl 11(b) of the sub-contract in the Singapore case spoke of the defendants 'shall within 14 days of the receipt by the contractor of *sum included in any certificate of the architect* notify and pay to the plaintiffs'. To

A me it is clear that Thean J construed the words emphasized by me in the said cl 11(b) in the context of cl 11(a) which I have reproduced earlier. When read in this way it is inevitable that the learned judge observed:

B I now turn to cl 11(b) of the sub-contract. It is significant to note that the material part of cl 11(b) of the sub-contract, namely: 'Within five days of the receipt by the contractor of the sum included in any certificate of the architect the contractor shall ... pay ...' is slightly different from and in my view more explicit than the corresponding part of cl 11(b) of the sub-contract in the *Hong Kong Teakwood* case which is as follows: 'Within 14 days of receipt by the main contractor of payment from the employer against any certificate from the architect, the main contractor shall ... pay ...'.

C What is more important, however, is that there is no suggestion in the *Brightside Mechanical & Electrical Services Group Ltd* case⁴ that the sub-contract in that case had provisions similar to the provisions in cl 2 of the sub-contract in the present case. The Singapore case is clearly distinguishable. I am, therefore, satisfied that the plaintiff is entitled to be paid regardless of cl 27(a)(vii) of the main contract.

D Turning to the second issue, I shall deal first with the question of delay on the part of the plaintiff. It is to be noted that it was the defendant who without any reservation conveyed to all the sub-contractors of the project that the handing over date was scheduled on 15 July 1985 and not insofar as the plaintiff is concerned, on 20 October 1984 in respect of the first sub-contract and 8 December 1984 in respect of the second sub-contract as originally agreed. (See exh 'KTS2' annexed to the affidavit-in-reply of Kan affirmed on 7 August 1987.) In any event under the sub-contract the defendant would be entitled to claim any loss or damage caused by the delay on the part of the plaintiff if and only if the defendant's cross-claim for loss or damage comes within the provisions of the proviso to cl 8(a) which reads:

F Provided that the contractor shall not be entitled to claim any loss or damage under this clause unless the architect shall have issued to the contractor (with a duplicate copy to the sub-contractor) a certificate in writing stating that in his opinion the sub-contract works or the relevant section thereof ought reasonably to have been completed within the specified period or within any extended period or periods as the case may be.

G Here there is no evidence that the architect had issued any certificate under the said proviso. It is therefore futile for the defendant to assert that it is entitled to a cross-claim for delay on the part of the plaintiff in completing the sub-contract works. Furthermore in the weekly progress report No 60 (period: 29 May 1985 to 4 June 1985) it showed that the plaintiff had completed 100% of the air-conditioning installation and also the life installation except testing which had been carried out up to 90% (see exh 'KTS3' annexed to the affidavit-in-reply of Kan). As regards defective works, it is again to be noted that the defects liability period would only expire on 14 August 1986. There is not a single document in the exhibits annexed to the affidavits of the plaintiff or the affidavits of the defendant to show that the plaintiff had failed to rectify the defective works well within the defects

liability period. On the contrary some of the documents clearly showed that the plaintiff had completed the defective works well before 14 August 1986. Again the purported cross-claim under the second issue must surely fail.

The appeal of the defendant is dismissed with costs. The order of the SAR is confirmed.

Appeal dismissed.

Reported by Kevin Mathews

Syarikat Tan Kim Beng & Rakan-Rakan v Pulai Jaya Sdn Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 186 OF 1985
PEH SWEE CHIN J
18 SEPTEMBER 1991

Contract — *Building contract — PAM Standard Form of Building Contract (1979 Ed) cl 11, 22, 23 & 30(1) — Sums certified by architect and unpaid — Counterclaim for alleged defective work*

Contract — *Liquidated damages — Whether employer can claim liquidated damages when architect has granted an extension of time — Whether notice of delay from contractor necessary when delay is caused by extra work ordered by architect*

By a contract made on 7 July 1982 incorporating the PAM Standard Form of Building Contract Conditions (1979 Ed), the plaintiff contractors agreed with the defendant, a developer, to erect 107 units of single-storey terrace houses in Simpang Pulai, Ipoh. Due to disputes over defects and alleged late handing over of the keys, amounts certified and due to the plaintiff under the contract totalling \$365,744.88 remained unpaid.

The defendant resisted the plaintiff's claim on three grounds. First, that the work executed was defective and that other contractors had to be engaged for remedial works, at a cost of \$9,268.90, which amount the defendant counterclaimed. Second, that the plaintiff was late in completing the work by 8 months and 25 days and that the defendant was entitled to liquidated damages amounting to \$176,675 at the rate of \$5,000 per week, under cl 22 of the contract, despite the architect having granted to the contractor an extension of time of nine and a half months under cl 23 in respect of this delay which was caused, inter alia, by the postponement of the works and extra works ordered on the defendant's behalf. Third, that the contractor had wrongfully detained keys to houses built by him under the contract, thereby causing the defendant to be liable to the purchasers in damages for late delivery.

- A** **Held**, allowing the plaintiff's claim and allowing the defendant's counterclaim to the extent of \$2,533.90 only:
- (1) The defendant's counterclaim for defective work had only been proved in evidence to the extent of \$2,533.90. It was not necessary for the court to speculate whether the defendant would have been in a position to prove all the defects alleged.
- B** (2) In this case, it was open to the architect to grant an extension of time under cl 23 of the contract even if, as had been argued by the defendant, the contractor's notice of delay had not been given as soon as the delay became apparent, because the additional work which caused the delay had been ordered by the architect pursuant to cl 11(1) of the contract and for delay caused by the postponement of work under cl 21(2) (which were grounds for extension of time under cl 23(e)) the architect required no notice or early notice of delay which was brought about by himself. The grant of an extension of time exonerated the plaintiff from liability for liquidated damages.
- C**
- D** (3) There was no evidence that, at the date of trial, the developer had paid compensation to the purchasers of the houses for late delivery or on account of the keys of the houses being wrongfully detained by the plaintiff. Any such claim remained at best a potential claim in a future action and was therefore premature and could not be entertained.
- E**

[Bahasa Malaysia summary]

F Melalui satu kontrak yang dibuat pada 7 Julai 1982 yang menggabungkan Syarat-Syarat Kontrak Pembinaan Bentuk Seragam PAM (Edisi 1979), plaintif kontraktor bersetuju dengan defendan, seorang pemaju, untuk mendirikan 107 unit rumah teres setingkat di Simpang Pulau, Ipoh. Oleh kerana pertikaian atas kerosakan dan dakwaan kelewatan dalam menyerahkan kunci, amaun yang disahkan dan perlu dibayar kepada plaintif di bawah kontrak itu berjumlah \$365,744.88 masih belum dibayar.

G Defendan menentang tuntutan plaintif atas tiga alasan-alasan. Pertama, bahawa kerja yang dilaksanakan adalah tidak sempurna dan bahawa kontraktor-kontraktor lain terpaksa diambil untuk kerja-kerja pembaikan pada kos sebanyak \$9,268.90, yakni amaun yang dituntutbalas oleh defendan. Kedua, bahawa plaintif telah lewat dalam menghabiskan kerja selama 8 bulan dan 25 hari dan bahawa defendan adalah berhak kepada ganti rugi jumlah tertentu yang berjumlah kepada \$176,675 pada kadar \$5,000 seminggu, di bawah fasal 22 kontrak itu, walaupun arkitek telah memberikan kontraktor suatu perlanjutan masa selama sembilan setengah bulan di bawah fasal 23 berkenaan dengan kelengahan ini yang disebabkan, antara lainnya, oleh penangguhan kerja-kerja dan kerja-kerja lebihan yang diarah bagi pihak defendan.

H Ketiga, bahawa kontraktor telah dengan salahnya menahan kunci-kunci kepada rumah-rumah yang dibina olehnya di bawah kontrak, dengan itu menyebabkan defendan bertanggungjawab kepada pembeli-pembeli dalam ganti rugi untuk hantar-serah lewat.

I

Diputuskan, membenarkan tuntutan plaintif dan membenarkan tuntutan balas defendan setakat \$2,533.90 sahaja: **A**

- (1) Tuntutan balas defendan untuk kerja-kerja tidak sempurna hanya dibuktikan dalam keterangan setakat \$2,533.90. Adalah tidak perlu bagi mahkamah mengagak sama ada defendan akan berada dalam kedudukan untuk membuktikan semua kerosakan yang didakwa. **B**
- (2) Dalam kes ini, adalah terbuka kepada arkitek untuk memberi perlanjutan masa di bawah fasal 23 kontrak walaupun, seperti yang dihujah oleh defendan, notis kelengahan oleh kontraktor tidak diberi sebaik sahaja kelengahan menjadi ketara, kerana kerja-kerja tambahan yang menyebabkan kelengahan itu telah diarahkan oleh arkitek menurut fasal 11(1) kontrak itu dan bagi kelengahan yang disebabkan oleh penangguhan kerja di bawah fasal 21(2) (yang merupakan alasan-alasan untuk perlanjutan masa di bawah fasal 23(e)), arkitek tidak memerlukan notis atau notis awal tentang kelengahan yang disebabkan oleh dirinya sendiri. Pemberian perlanjutan masa melepaskan plaintif daripada liabiliti untuk ganti rugi jumlah tertentu. **C**
- (3) Tidak ada keterangan bahawa, pada tarikh perbicaraan, pemaju telah membayar pampasan kepada pembeli-pembeli rumah untuk hantar-serah lewat atau oleh kerana kunci-kunci rumah itu ditahan secara salah oleh plaintif. Sebarang tuntutan sedemikian hanya merupakan tuntutan yang akan menjadi kemungkinan dalam satu tuntutan lain kelak dan oleh itu adalah belum cukup masa lagi dan tidak boleh dilayan.] **D**

Notes

For cases on building contract, see 3 *Mallal's Digest* (4th Ed) paras 873-941. **E**

For cases on liquidated damages, see 3 *Mallal's Digest* (4th Ed) paras 1036-1039.

Hira Singh (Asbir Hira Singh & Co) for the plaintiff.
LA Gomes (LA Gomez & Co) for the defendant. **F**

Cur Adv Vult

Peh Swee Chin J: The plaintiff was the building contractor (hereafter called 'the contractor') and the defendant, the housing developer (hereafter called 'the developer') in respect of 107 units of single-storey terrace houses in Simpang Pulai, Ipoh, by a contract dated 7 July 1982 made between the parties, and incorporating the PAM Standard Form of Building Contract Conditions (1979 Ed). **G**

It was not disputed that the developer would pay for the contract work by progress payments to be certified by the architect named in the contract, the same gentleman having been employed and paid by the developer. On any of such certificates issued by the architect being presented to the developer, payment for the sum certified must be made within 14 days of presentation: cl 30(i) of the contract. **H**

I

A The contractor alleged that ten certificates were issued for a total sum of \$2,423,384.88, on account of which \$2,057,640.00 was paid, leaving a balance of \$365,744.88 which remained unpaid, and hence the present action.

B From the lengthy evidence and submissions, to put it in a nutshell, it would appear that the developer resisted the claim of the contractor on three grounds.

C The first ground was that the work executed by the contractor was defective and the developer had to engage others to remedy such defects as caused by the contractor, and by way of set-off and counterclaim the developer counterclaimed \$9,268.90 and further, to quote from the relevant prayer in the counterclaim: 'The amount to be assessed by the engineer for such defects in the work carried out by the plaintiff to be deducted and also the rectification of the improper materials and poor workmanship used for construction of the houses.'

D The answer from the contractor was that no such defects had been proved, and that there were no defects. The court examined the evidence about such defects.

E The managing director of the developer testified that the defects he complained of were as stated in two letters he sent to the contractor, and such defects were not remedied by 1 August 1984 when the architect issued the final certificate. There were about 44 allegedly defective items relating to the various houses. Those defects ranged from a rather serious-sounding 'Gap on longer wall between ceiling(s)' to such minor ones as 'Rubbish on house floor'.

F The second letter contained about 36 items of alleged defects consisting of leaking in various parts of various houses, or even blockage of some toilet bowls.

G The remedying of these defects and the cost of doing so, however, were not testified to by any engineer or those people said to have been employed by the developer. No application for postponement was made to call any such persons to court to give evidence. What happened merely was that the developer's managing director, the only witness for the developer, produced in court three payment vouchers made by the developer for the sums of \$374.50, \$732.90 and \$449 respectively, with particulars of the names of the payers, recipients and amounts. These three payment vouchers were admitted in evidence with the objection or comment from learned counsel for the contractor that they were of a suspicious nature. The three sums totalled \$1,556.40. Two other payment vouchers were also admitted in evidence for the sums of \$827.50 and \$150 respectively, totalling \$977.50.

H The developer also sought to introduce in evidence a bill from Yip Construction for \$5,000 which was not proved by anyone from Yip Construction. The sum of \$5,000 would therefore have to be excluded totally from the court's deliberation. The total amounts of those five payment vouchers admitted in evidence came to \$2,533.90. On the balance of probabilities, the court, therefore found a sum of \$2,533.90 proved on the developer's counterclaim for defects. It would not be necessary for the court to speculate whether the developer would have been in a position to prove all the defects alleged.

I revert again to the grounds against the claim for the balance of the total sum claimed on ten architect's certificates. I now deal with the second ground of the developer, that is, for a sum of indemnity for delay in the completion of the work in accordance with cl 22 of the contract at the rate of \$5,000 per week amounting to \$176,675 for a period of 8 months and 25 days: vide the developer's 'Defence and counterclaim'.

Clause 22 provides:

If the Contractor fails to complete the Works by the Date for Completion stated in the appendix to these Conditions or within any extended time fixed under clause 23 or clause 32(1)(c) of these Conditions and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the said appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any monies due or to become due to the Contractor under this Contract.

In evidence or in submission, the delay complained of by the developer was nine and a half months or 50 weeks and the claim for such indemnity or liquidated damages was \$250,000. Despite the difference between the figure here and that in the written counterclaim, the court would go along with the figure of \$250,000 here as no formal objection was raised to such difference on account of the pleading or counterclaim, thus doing substantial justice between the parties.

The delay of nine and a half months, however, was the very delay excused by the architect in the form of extension of time granted by him pursuant to the contract. Though he was no doubt nominated by the developer and paid by him, no one should doubt that the architect had to act professionally in accordance with the contract. The court was bound however to consider the reasons given by the developer for saying that the extension of time was invalid for not being given in accordance with cl 23 of the contract. This was the first reason.

Clause 23 provides:

Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect, and if in the opinion of the Architect the completion of the Works is likely to be or has been delayed beyond the Date of Completion stated in the appendix to these Conditions or beyond any extended time previously fixed under either this clause or clause 32(1)(c) of these Conditions,

- (a) by force majeure, or
- (b) by reason of any exceptionally inclement weather, or
- (c) by reason of loss or damages occasioned by any one or more of the contingencies referred to in clause 20(A), (B) or (C) of these Conditions, or
- (d) by reason of civil commotion, local combination of workmen, strike or lockout affecting any of the trades employed upon the Works or any of the trades engaged in the preparation, manufacture or transportation of any of the goods or materials required for the Works, or
- (e) by reason of Architect's instructions issued under clauses 1(2), 11(1) or 21(2) of these Conditions, or

...

then the Architect shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing a fair and reasonable extension

- A** of time for completion of the Works. Provided always that the Contractor shall use constantly his best endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the Architect to proceed with the Works.

It will be noticed from cl 23(e) that an extension of time could be granted beyond any time previously fixed, by virtue of any instructions issued by the architect under, inter alia, cl 11(1) of the contract.

- B** Clause 11(1) and (2) provides:

(1) The Architect may issue instructions requiring a variation and he may sanction in writing any variation made by the Contractor otherwise than pursuant to an instruction of the Architect. No variation required by the Architect or subsequently sanctioned by him shall vitiate this Contract.

- C** (2) The term 'variation' as used in these Conditions means the alteration or modification of the design, quality or quantity of the Works as shown upon the Contract Drawings and described by or referred to in the Specifications, and includes the addition, omission or substitution of any work, the alteration of the kind or standard of any of the materials or goods to be used in the Works, and the removal from the site of any work materials or goods executed or brought thereon by the Contractor for the purposes of the Works other than work materials or goods which are not in accordance with this Contract.

...

- E** Thus, the architect might by his instructions himself require a variation, or might sanction a variation relating to design, quality or quantity of work, including an addition of the work, that is, additional or extra work.

Clause 23(e) also allowed the architect to grant extension of time by virtue of his instructions issued under cl 21(2) of the contract, which provides:

- F** The Architect may issue instructions in regard to the postponement of any work to be executed under the provisions of this Contract.

Directly in connection with the delay, the architect's grant of an extension of time was contained in a letter from the architect (with copy to the developer) addressed to the contractor. It read as follows:

- G** Syk Tan Kim Beng & Rakan-Rakan,
No 37B, Jalan Woo Saik Hong,
Teluk Intan, Perak.

Dear Sir,

- H** Proposed 107 units single storey terrace houses on Lot 36865, Simpang Pulau, Perak

We refer to your claims of extension of completion date, and in accordance with the conditions of building contract, we hereby confirm the authorized extended time due to the following:

- I**
- | | | |
|---|--|-------------|
| 1 | Delay in the commencement date of the building works due to delay of earthworks and piling works. Actual commencement date is 15 August 1982 | - 3 months |
| 2 | Additional works involving BRC reinforcement | - 3 months |
| 3 | Additional works to install water taps in toilets | - 1 month |
| 4 | Additional works in laying mosaic floor in kitchen of non-mindef houses | - 1½ months |

5	Additional works to kitchen involving plinths for kitchen cabinets	-	1½ months	A
6	Delay in construction of culverts due to settlement of drains	-	1½ months	
	Total delay	-	9½ months	

In view of the above the contract completion period is extended to 27 December 1983. The actual completion date is 29 November 1983. We confirm that there is no delay in the completion period.

Yours faithfully
Akitek C N Hwong

Sgd

(Hwong Cheng Ngen) Chartered Architect
A ARCH (WA), A WAIT, APAM, ARIBA

cc M/s Pulai Jaya Sdn Bhd
M/s WY Chan & Roy

What could the court do in the face of this letter? The award of extension of time itself was attacked on the ground it was invalid because when issuing it, the architect was *functus officio*, in the sense, as the court understood it, that the architect could not function any more. It was a bare assertion by the defendant, for a scrutiny of the provisions of the contract did not reveal anything as to when and where the architect would become *functus officio* under the contract.

Again, the extension of time under cl 23 granted by the architect was consequent upon notice to the architect from the contractor as to the cause of any delay upon such delay becoming reasonably apparent to the contractor.

It was argued that the notice of delay sent to the architect by the contractor was invalid because it was not sent as soon as the delay became reasonably apparent.

The contractor's notice of delay read:

Registered

Akitek CN Hwong
Room 107, Asia Life Building
Jalan Hale
Ipoh.

Dear Sirs

Proposed 107 units single storey terrace houses on Lot 36865, Simpang Pulai, Ipoh for Pulai Jaya Sdn Bhd

With reference to the above tendered work, we are to advise you that work commenced on 15 August 1982, per our letter to you dated 14 September 1982 and our tendered date of completion was one year from commencement.

However, please be informed that the completion date has been delayed due to the piling works carried out by you all and which has delayed our completion date by another three months.

Furthermore, your instructions to add BRC to the flooring has also caused another delay of about two months, in addition to which you have instructed us

A also to add tilings and extra piping to the kitchen area which will add further delay to completion.

We are also to inform you that your work has been delayed by the non-completion of the drains and we hope that such work can be completed soon so that we can continue with our work.

B The above are for your information and file as these factors will cause the final date of completion to be extended.

Thanking you.

Yours faithfully
Sgd

C cc to:
Pulau Jaya Sdn Bhd,
Ipoh

Tan Yap & Associates,
Consultants,
Ipoh.

D The court was not referred to any evidence and there was none to pinpoint either the time or date when the additional work became apparent, but such additional work was ordered by the architect in any event and was for the benefit of the developer and in pursuance of the contract. The architect, therefore, must have had knowledge of the apparentness of such delay, and
E the architect therefore required no notice or early notice of such delay brought about by himself. There was no evidence or even a bare allegation that the additional work was fictitious.

Even assuming that early notice of delay to the architect from the contractor was mandatory despite its superfluity, the court was, however, of the view that it would be placing too harsh a burden on the architect to require him to extend the contract period immediately at the time when he ordered additional work, or when he was requested by the contractor to extend time by a fixed or stated period. Everybody should wait until the additional work was completed, or in other words until the cause of delay had ceased to operate. Clause 23 expressly stated that '... if in the opinion of the architect, the *completion of the Works is likely to be delayed or has been delayed beyond the Date of Completion ...*'. (The emphasis is mine.) The words emphasized would indicate that the opinion of the architect could be formed after the delay had occurred, or after the delay had ceased, more workably the latter.

F
G
H The developer's third ground for resisting the plaintiff's claim for the balance of the price of work done was that the contractor had wrongfully detained keys to the houses built by him for the developer thereby causing the defendant to be liable in breach to purchasers, presumably in damages for late delivery.

I The court again scrutinized the evidence and found that there were two groups of purchasers of the houses in question: the first group consisted of buyers for whom the Ministry of Defence in Kuala Lumpur bought or acted; the other group being other miscellaneous buyers. There was not one iota of evidence that the developer had, as on the date of trial, paid any compensation for late delivery or on account of the keys to the houses being wrongfully withheld by the contractor. Any such potential claim remained

at best a potential claim for some other action in future and the claim therefore in this respect was premature and could not be entertained.

In the result, I gave judgment for the plaintiff in the sum as claimed and judgment for the developer on the counterclaim in the sum of \$2,533.90. In view of the developer recovering only a small part of its counterclaim, I ordered that costs of the whole action to the extent of two-thirds be paid by the defendant to the plaintiff and that there be no further order for costs on the counterclaim.

Order accordingly.

Reported by Prof Vincent Powell-Smith

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